CASE NBR: [91107050] CFY STATUS: [DECIDED]
SHORT TITLE: [Taylor, Kevin]
VERSUS [United States] DATE DOCKETED: [011792]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jan 17 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Feb 25 1992		Waiver of right of respondent United States to respond filed.
4	Mar 5 1992		DISTRIBUTED. March 20, 1992
5	Mar 12 1992	P	Response requested -- JPS. (Due April 13, 1992)
7	Apr 10 1992		Order extending time to file response to petition until May 13, 1992.
8	May 13 1992		Brief of respondent United States in opposition filed.
9	May 21 1992		REDISTRIBUTED. June 5, 1992
10	May 21 1992	X	Reply brief of petitioner Kevin Taylor filed.
12	Jun 8 1992		REDISTRIBUTED. June 12, 1992
14	Jun 15 1992		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

Command:[ ]
PREVIOUS CLEAR 24 11 SHOW, EXIT

91-7050

No.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KEVIN G. TAYLOR,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DANIEL K. SHERWOOD
380 Pleasant Street
Malden, MA 02148
(617) 324-4840

OPINIONS BELOW

The Opinion of the Court of Appeals, reported at 947 F.2d 1002 (1st Cir. 1991), appears in the Appendix A hereto.

No Opinion was rendered by the District Court for the District of Massachusetts.

JURISDICTION

The Judgment of the Court of Appeals for the First Circuit was entered on October 28, 1991. A timely Petition for a Rehearing was filed, but was denied on November 21, 1991 and is set forth in Appendix B hereto. This petition was timely filed after the denial of the Petition for Rehearing. Jurisdiction of this Court is invoked pursuant to 21 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first question present involves the interpretation of Article IV of the Interstate Agreement on Detainers ("IAD") (18 U.S.C., App. 2) which is set forth below. The text of the complete IAD is set forth in the Appendix C hereto.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of

imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: And provided further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

The second question presented is whether Taylor received effective assistance of counsel and involves the Sixth Amendment to the Constitution of the United States which is set forth below.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE FACTS

On June 8, 1989 an unknown person walked into the Cambridge Trust Company in Kendall Square, Cambridge, Massachusetts and that person attempted to obtain money from the teller. On June 8, 1989 at the First American Bank in Boston, Massachusetts, an unknown male entered and walked to the teller window. This unknown male was able to escape with approximately $2,300.00. On June 22, 1989 at the Boston Five Cent Savings Bank in Boston, Massachusetts an unknown male approached the teller window, but, because the teller hesitated, the unknown person left the bank without obtaining any of the bank's funds.

On June 22, 1989, the petitioner, Kevin G. Taylor, was arrested by the Boston Police Department for the robbery of a bank not related to the three banks mentioned above. Taylor was held by the Suffolk County Superior Court in Boston, Massachusetts until

his trial in September, 1989. On July 18, 1989 the U.S. Marshall's filed a detainer pursuant to the IAD against Kevin Taylor. The U.S. Marshall's believed that Kevin Taylor was the unknown male who had entered the banks in Cambridge and Boston on June 8, 1989 and June 22, 1989, respectively, and either had taken or attempted to take money from those banks.

On September 23, 1989, Kevin Taylor plead guilty to one count of bank robbery in the Suffolk County Superior Court and was sentenced to 4-5 years at the Massachusetts Correctional Institution, Cedar Junction. Kevin Taylor is presently serving that sentence.

On October 4, 1989 Taylor was federally indicted for the three bank incidents on June 8, 1989 and June 22, 1989 in violation of 18 U.S.C. § 2113 (a). He was brought before Magistrate Cohen in the District Court for the District of Massachusetts on November 7, 1989 for arraignment. Taylor appeared, without counsel, in the District Court by means of a Writ of Habeas Corpus Ad Prosequendum. Magistrate Cohen entered a plea of Not Guilty and moved to the issue of whether Taylor should be detained federally. Magistrate Cohen asked the Assistant United States Attorney if there was a detainer filed against Taylor under IAD and the reply was that there was no detainer on Taylor. Taylor was thereafter released on the federal charges and returned to the custody of the state officials and returned to the state prison where he was serving his sentence.

Trial was scheduled for December 18, 1989 on the federal indictments, but because Taylor still was without counsel, the trial was continued to January, 1990. From the date of his federal arraignment to his trial, Taylor met with his court appointed trial counsel only once. While waiting for trial, Taylor filed a *pro se* Motion to Dismiss dated January 14, 1990. The basis of the Motion to Dismiss was a violation of the IAD. Specifically, the motion asserted a violation of the "anti-shuttling" provisions of Article IV(e). This motion was sent by mail to the court, but it had not been docketed as of January 24, 1990. Judge Skinner allowed the motion to be filed in open court by Taylor before his trial began. Argument was heard at side bar on the Motion to Dismiss and the motion was denied. Trial counsel was not familiar with the IAD and did not participate in the argument. He felt that the motion was without merit.

On January 24, 1990 Taylor was brought to the federal courthouse by state prison officials. The U.S. Marshals took custody of Taylor on his arrival and the courthouse and his trial began. At the end of the first trial day of January 24, 1990, the U.S. Marshals returned Taylor to the Massachusetts State Prison officials and he was returned to the state prison where he was serving his state sentence. He was returned the next day of January 25, 1990 by the Massachusetts State Prison officials for the second day of his trial. However, at the conclusion of the second day of trial, Taylor was returned to the Massachusetts State Prison in federal custody. He was returned in federal custody at

the insistence of the government because the government asserted that the provisions of the IAD applied to Taylor's case and that the government was fearful that the indictment could be dismissed if Taylor was returned to the Massachusetts State Prison in state custody. There was a brief discussion with Judge Skinner about whether to return Taylor to the Massachusetts State Prison in federal or state custody. Judge Skinner did not believe that the IAD was applicable to the case at all. Trial counsel was still unfamiliar with the language of the IAD and could not, and did not, advocate for Taylor on this issue. The United States Marshall sent a letter to the Massachusetts State Prison confirming that Taylor was in federal custody when he returned on January 25, 1990.

On January 29, 1990 Taylor filed with the District Court a post-trial Motion to Arrest Judgment. The basis of this motion was Taylor's continued argument that the proceedings in his case violated the terms of the IAD. This motion was denied by Judge Skinner on May 15, 1990.

Also on May 15, 1990, Taylor appeared at the District Court for sentencing. He was in federal custody when he arrived. At this hearing, Taylor again asserted the claim that the proceedings against him on this indictment violated the terms of the IAD. Judge Skinner denied every request made by Taylor that the proceedings against him stop because of violations of the IAD. Trial counsel, who by now had had approximately five months to familiarize himself with the IAD, still was unfamiliar with the terms of the IAD and did not advocate any issue concerning the IAD

at the hearing on May 15, 1990. Taylor was sentenced to 84 months incarceration to be served concurrently with the state sentence that he was currently serving. Taylor timely filed a Notice of Appeal.

The Petitioner's main arguments to the First Circuit were that the government had violated the terms of the Article IV of the IAD and that such violation mandated that the Indictments against him be dismissed and that he was denied effective assistance of counsel when his Trial Counsel failed to investigate, research or argue the defense that the IAD had been violated. The First Circuit acknowledged that a violation had occurred if the IAD was read literally. Trial Counsel essentially abandoned the advocacy of a viable defense to the Petitioner.

In a very short opinion, the First Circuit refused to apply the IAD literally. Instead, the First Circuit held, without support in the record, that a brief interruption of the Petitioner's state custody posed no threat to the rehabilitation of the Petitioner. The First Circuit also held, without discussion, that the Petitioner's claim of ineffective assistance of counsel was without merit.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

The fundamental questions in this Petition are

1.) whether the government is obligated to follow the terms of its own laws and must suffer the consequences of its violation of law and 2.) whether trial counsel properly advocated for the Petitioner concerning his claim for relief based upon violations of the IAD. This Court should grant Certiorari because the decision of the First Circuit permits the government to violate the law with impunity. Certiorari should also be granted because the decision of the First Circuit is in conflict with the decision of this Court in U.S. v. Mauro, 436 U.S. 340 (1978). The decision of the First Circuit is also in conflict with the decisions of the Third and Tenth Circuits, but in agreement with decision of the Second Circuit. The Petitioner believes that the issues presented are important enough for this Court to settle the issues presented.

B. GOVERNMENT'S VIOLATION OF LAW

In 1970, the United States Congress passed the Interstate Agreement on Detainers (18 U.S.C. App.). The IAD was passed as a means to resolve untried indictments or complaints where the accused was serving a prison sentence in another jurisdiction. The IAD has procedures pursuant to Article IV which allows a prosecuting official to request the temporary custody of an incarcerated person in order to try any unresolved indictments in the prosecutor's jurisdiction. By enacting the IAD, Congress made the United States a party to the IAD. As a party to the IAD, the United States may request the temporary custody of a prisoner to

try any unresolved federal charges against a prisoner and the United States is required to surrender temporary custody to another jurisdiction so that a federal prisoner may be tried on unresolved state offenses. U.S. v. Mauro, Id.

In this case, both the government and the First Circuit have acknowledged that the IAD is applicable the Petitioner's case and, indeed, the First Circuit has acknowledged in its Opinion that the government violated the literal terms of the IAD. However, the First Circuit has refused to enforce the terms of the IAD. It is, however, little comfort to the Petitioner to know he is right, while being denied relief.

The Petitioner respectfully suggests that the First Circuit did not follow the decision of this Court in U.S. v. Mauro. In Mauro, this Court stated that the United States was a party to the IAD both as a "sending" and "receiving" State and would be bound by the terms of the IAD. 436 U.S. at 354. This Court also stated that "[f]or these reasons the stated purpose of the Agreement is "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, information, or complaints." 436 U.S. at 360.

The First Circuit's decision regarding the Petitioner disregards the above-stated obligations of the United States and it also disregards the purpose of the IAD. The decision in Mauro reaffirmed the position that the United States was bound by the

terms of the IAD without qualification. The obligations of the United States under Article IV(e) of the IAD are:

> "(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

The obligations of the United States are clear, unambiguous and mandatory. The First Circuit's decision acknowledged that the Petitioner was correct when he claimed that the United States did not follow the clear and unambiguous provisions of an Act of Congress, but the First Circuit absolved the United States from the equally clear and unambiguous sanction for the failure of the United States to follow the law. If the stated purpose of the IAD is to encourage the expeditious and orderly disposition of outstanding charges and determination of the proper status of any and all detainers based on untried indictments, information, or complaints, then the failure of the Unites States to follow the procedures set forth in the IAD must frustrate that purpose. Absolving the United States from complying with its obligations can only create the problems in resolving untried federal indictments against state prisoners that the IAD was passed to prevent.

When it passed the IAD Congress provided for the ultimate penalty for the United States' failure to follow the procedures of the IAD. If the United States fails to follow the terms of the IAD, then dismissal is the appropriate penalty. If Congress had

wanted to provide for a lesser penalty or if Congress had wanted to have the penalty fit the particular transgression of the United States, then the penalty would not have been so severe; nor mandatory. Congress would have permitted the courts to fashion an appropriate remedy. Congress did not do that. Congress enacted a set of procedures and provided that if the United States did not follow these procedures, then it would lose any indictment against a prisoner. The IAD is clear and simple. This Court in Mauro upheld the IAD procedures and the First Circuit should have enforced the terms of the IAD and it should have dismissed the indictment against the Petitioner.

The First Circuit's decision ignores the procedural requirements of the IAD and it based its decision squarely on the assumption that the Petitioner suffered no injury because of the federal detainer and the brief interruptions in state custody. There is simply no information in the record from which the First Circuit could have made that assumption. The IAD is a set of procedures and does not require that a prisoner allege that any rehabilitative programs have been denied or that the prisoner has suffered any injury in order for the prisoner to be protected by the terms of the IAD. The First Circuit assumed that because there were only short interruptions in the time that the Petitioner was physically absent from his state institution that there has been no harm to him. The First Circuit is speculating what harm may or may not have been done to the Petitioner. A federal detainer has impact against a state prisoner just by its mere filing and in ways

other than whether the Petitioner is physically absent from the state institution. The Petitioner may have been denied the privilege of a medium or light security facility with the benefits available at such a facility. Certain jobs may have been denied him because of the federal detainer. Certain educational programs may not be offered at high security facilities and thus unavailable to the Petitioner. What consequences the Petitioner has or has not suffered was not known by the First Circuit. If, but for the federal detainer, the Petitioner could have received additional or different rehabilitation programs than he was receiving at the time of his arraignment, then he has suffered because of the detainer regardless of whether he was physically absent from the state institution. It is the detriment that a prisoner suffers because of the mere filing of a detainer that the IAD was passed to correct. This Court should review the First Circuit's decision and enforce the IAD's procedures.

The First Circuit's decision is based not on the language of the IAD, but on the underlying purpose of the IAD. (Opinion of the First Circuit, p.3) The Petitioner respectfully suggests that the First Circuit did not need to look at the underlying purpose of the IAD not enforce its terms as written. Where the language of the statute is clear and unambiguous, there is no need to consult the purpose or history of the statute. The First Circuit should have enforced the IAD as written.

C. CONFLICT BETWEEN THE CIRCUITS

The First Circuit's decision is also in conflict with the decisions in two other Circuits. In U.S. v. Schrum, 504 F.Supp. 23 (D.Kan. 1980)(aff'd, 638 F.2d 214 (10th Cir. 1981)) the District Court in Kansas was faced with a factual situation very similar to the facts in the present case. In Schrum, the United States Marshall's Office filed a detainer on the defendant without the knowledge of the United States Attorney Office. A Writ of Habeas Corpus Ad Prosequendum issued and the defendant was transferred to federal custody for arraignment and returned to state custody without trial. After discussing the various competing interests, the District Court ruled that the IAD should be enforced according to its terms and dismissed the indictments. The District Court judge believed that the IAD compelled the dismissal of the indictments.

Similarly, in U.S. v. Thompson, 562 F. 2d 232 (3rd Cir. 1977)(en banc), the Third Circuit strictly construed the language of Article IV(e) according to its plain and unambiguous meaning which resulted in the dismissal of the Indictment against that defendant. The Third Circuit in Thompson stated:

> we believe the Detainer Agreement should be enforced according to its terms without the district court's being required to judge those terms, including IV(e), in the light of the Detainer Agreement's statutory purposes, as stated in Article I (citation omitted), every time the prosecutor chooses to ignore its wording. If Congress had wanted the district courts, in their discretion, to apply the clear provisions of Article IV(e) of the

> Detainer Agreement in the light of the purposes of such Agreement, such wording would have been included in Article IV(e).

The First and Second Circuits have decided cases in conflict with Schrum and Thompson. The First Circuit case of United States v. Taylor, 861 F.2d 316 (1st Cir. 1988)(no relation to Petitioner, Kevin G. Taylor) and the Second Circuit cases of United States v. Roy, 771 F.2d 54 (2d Cir. 1985) and United States v. Chico, 558 F.2d 1047 (2d Cir. 1977) stand for the proposition that brief violations of the IAD will not be enforced. These cases are in stark contrast to Schrum and Thompson which strictly hold each party to the IAD by the terms of that law.

The Petitioner also respectfully suggests that the decision in the present case is in conflict with prior decisions of the First Circuit concerning the IAD. Specifically, the First Circuit did not follow the decisions of Crooker v. U.S., 814 F.2d 75 (1st Cir. 1987), U.S. v. Currier, 836 F. 2d 11 (1st Cir. 1987), U.S. v. Taylor, 861 F.2d 316 (1st Cir. 1988) and U.S. v. Hunnewell, 891 F.2d 955 (1st Cir. 1989).

In Crooker the Court was asked to extend the provisions of the IAD to prisoners who had been sentenced in another jurisdiction, but had not yet reached the place where the sentence would be actually served. The Court responded that "**the statutory language is a bright line precisely measuring its purpose, and we are not persuaded to enlarge it.**" (Emphasis Added) 814 F.2d. at 78. In Currier the Court held the IAD inapplicable to that defendant because there were no untried indictments actually

pending against the defendant even though a document called a "Detainer" had been filed against that defendant. The Court again strictly interpreted the statutory language and concluded that the defendant did not fit into the strict interpretation of the statute. The Petitioner merely asks that the bright line of statutory interpretation be read consistently. If it is proper to strictly hold the **defendants** in Crooker, Currier and Taylor to the bright line of the statutory language, then United States, a party to the IAD, should be held to the same bright line interpretation of the statutory language. The Petitioner is not asking the Court to give him any special consideration, he is merely asking the Court to enforce the IAD as it is written and apply it to the United States the same way the IAD has been applied to defendants.

The Petitioner requests that this Court resolve the conflict between the Circuits and that this Court establish one clear set of rules to be followed by all circuits when deciding cases involving the IAD. The IAD was passed in 1970 and Mauro was decided in 1978. Twelve years have passed since Mauro was decided and the Circuits are still struggling to interpret the IAD. This Court should take the opportunity to finally resolve the issues regarding the IAD.

D. THE FIRST CIRCUIT DECISION MAKES THE IAD MEANINGLESS IN STATES WITHOUT A FEDERAL DETENTION FACILITY

The First Circuit's decision makes the IAD meaningless in Massachusetts and in any other state which does not have a federal detention facility. According to the decision any one-day transfer from a Massachusetts prison facility to the District Court and back to the same Massachusetts prison facility has no IAD implications even after a Detainer is filed and a Request for Temporary Custody has been made. If that is the case, what purpose is served by the IAD?

The Petitioner was transferred back and forth from his Massachusetts state prison to federal custody and back to State custody on three occasions (Arraignment and two days of trial). The Petitioner was also brought to the District Court from the Massachusetts state prison in federal custody for the Sentencing Hearing. On each occasion after the arraignment he protested the procedure as a violation of the IAD without success.

The practical effect of this decision is to make detainers meaningless in Massachusetts. Any state prisoner can be brought to the District Court and returned the same day to state prison. Even if for logistical reasons a transfer could not be accomplished in one day, such a transfer could certainly be accomplished in a day and one-half. Despite the terms of the IAD to the contrary, the federal government will never have to take custody of a state prisoner in Massachusetts. This is clearly in

opposition of the IAD and in conflict with Mauro which specifically determined that the United States had to comply with the requirements of the IAD for a "Receiving State". Additionally, using the First Circuit's rationale, if a New Hampshire state prisoner can be transported across state lines to Massachusetts and can be returned to New Hampshire state prison the same day, then there are no IAD implications. Any one-day interruption of state custody is, *per se*, without injury to the state prisoner and has no IAD implications. Surely Congress did not take the time to pass a meaningless law!

E. THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The Petitioner asserts that he was denied effective assistance of counsel in the District Court which warrants the reversal of his conviction. Trial counsel provided ineffective assistance of counsel by failing to identify the IAD, on his own, as a possible defense. Trial Counsel also provided ineffective assistance when, once the IAD was identified by the Petitioner as a defense, he failed to research, investigate and advocate the IAD as a defense.

The standard of review for claims concerning ineffective assistance of counsel was stated in Strickland v. Washington, 466 U.S. 668 (1984). Trial counsel has the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Id. at 688 (quoting Powell v. Alabama, 287 U.S.

45, 68-69 (1932)). Petitioner asserts that his trial counsel did not bring to bear the skill and knowledge of an ordinary fallible attorney and that, but for his trial counsel's deficiencies, the result of the District Court proceedings would have been different. The Petitioner also states that it is expected that a reasonably competent attorney would know the provisions of the IAD. Crooker, 814 F. 2d at 79.

The Petitioner asserts that his Trial Counsel failed to protect the Petitioner's rights under the IAD by not researching or investigating the detainer issue. A reasonably competent attorney should have spotted the IAD as a potential issue when he or she realized that Petitioner was a prisoner serving a state sentence and he was being transferred to federal custody for trial. Trial counsel should have also investigated the IAD when the IAD was identified by the Petitioner as an issue just prior to the beginning of the trial of this case. The Petitioner filed a **pro se** Motion to Dismiss. Trial counsel did not follow up on the issue. Trial Counsel was certainly informed that the IAD would be an issue, but he did not research the IAD nor did he ever advocate for the Petitioner on this most important aspect of the case. He did not advocate prior to, during or after the trial. Surely Trial Counsel had an opportunity to research the issue by the time of the sentencing hearing which was held 5 months after trial. But Trial Counsel was still unfamiliar with the IAD and its provisions. Trial counsel prepared no document concerning the IAD even after the government filed a 30 page memorandum in opposition to the

Petitioner's **pro se** Motion to Arrest Judgment. On May 15, 1990 when the District Court asked for argument concerning that Motion to Arrest Judgment, Trial Counsel waived argument and surrendered the advocacy of the motion to Petitioner alone. By leaving the advocacy to the Petitioner alone, Trial Counsel abandoned his function to make the District Court proceedings a reliable adversarial testing process. A reasonably effective trial counsel would have investigated the IAD issue and would have been prepared to argue in favor of the Motion to Arrest Judgment on May 15, 1990. A reasonably effective Trial Counsel would have been prepared to argue in favor of that motion even if it was Trial Counsel's personal opinion that that motion would not succeed.

The Petitioner asserts that his Trial Counsel's failure to properly advocate the IAD issue undermines the confidence in the outcome of the District Court proceedings and warrants a reversal of the convictions against him and the dismissal of the indictments against him.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the First Circuit in this matter.

Dated: January 14, 1992

Respectfully submitted
Kevin G. Taylor
By His Attorney

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United States Court of Appeals
For the First Circuit

No. 90-1572

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

KEVIN TAYLOR,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, U.S. District Judge]

Before

Breyer, Chief Judge,

Aldrich, Senior Circuit Judge,

and Campbell, Circuit Judge.

Daniel K. Sherwood for appellant.
Duane J. Deskins, Assistant United States Attorney, with whom Wayne A. Budd, United States Attorney, was on brief for appellee.

October 28, 1991

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1572.

UNITED STATES,
Appellee,

v.

KEVIN TAYLOR,
Defendant, Appellant.

BEFORE
Breyer, Chief Judge,
Aldrich, Senior Circuit Judge,
Campbell, Torruella, Selya and Cyr, Circuit Judges.

ORDER OF COURT
Entered: November 21, 1991

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc:Messrs. Sherwood, Deskins]

ALDRICH, Senior Circuit Judge. The only question of consequence in this case is whether defendant's rights under the Interstate Agreement on Detainers ("IAD"), 18 U.S.C. Appendix 2, Article IV(e), were violated when he was taken from Massachusetts custody in its state prison, MCI-Concord, to the District Court for the District of Massachusetts on a writ of habeas corpus ad prosequendum for arraignment for an unrelated crime and returned to state custody the same day. Under Article IV(e) he should have been tried "prior to . . . being returned to the original place of imprisonment" in the "sending state." Article V(e). The problem arises from the fact that when the arrest warrant for the federal offenses had been issued defendant had been in MCI-Concord awaiting a state trial and the U.S. Marshall had filed a detainer with the state, activating the IAD, unrequested by, and unreported to, the United States Attorney. As a consequence, when defendant was arraigned federally and the magistrate inquired whether there was a detainer, the assistant United States attorney told him there was not. Defendant, who was unrepresented by counsel, knew otherwise, but said nothing.[1] A discussion then took place between defendant and the magistrate as to which custody he preferred, and defendant said state, so to receive credit on the state sentence he was, by then, serving. The magistrate

1. There is no merit in the government's contention that he was obliged to speak.

acquiesced, remarking that since there were no federal institutions in Massachusetts, defendant would undoubtedly be at MCI-Concord whichever custody he was in.

Thereafter defendant filed a pro se motion to dismiss the federal indictment because of the violation of the IAD. Strictly, in literal accordance with the statutory language, defendant was correct. Our question is whether common sense rejects that literal application. We so hold. The test is the underlying purpose of the Act. United States v. Mauro, 436 U.S. 340, 349 (1978).

Three years ago another defendant named Taylor -- no relation -- went through the same procedure, being returned to state custody after arraignment, the same day, and we declined to apply the IAD. United States v. Taylor, 861 F.2d 316, 319 (1st Cir. 1988). Our reasoning, with citations, was that so brief an interruption was no threat to his rehabilitation, the main purpose of the Act, and that there could be advantages to a prisoner in not delaying a federal arraignment. Inherent in our decision, though we did not say so, was that the prisoner's return the same day was to the same institution from which he had been sent. We take this circumstance to be essential to our ruling.

It is true that in United States v. Taylor the defendant was in the Middlesex County jail and had not yet started his state prison confinement where rehabilitation would

commence, a distinction which we noted for other purposes in Crooker v. United States, 814 F.2d 75, 77 (1st Cir. 1987), but the Taylor court did not assert that for this aspect of its ruling. What we rely on is the single day interruption of the state confinement, and the manifest lack of injury.

We have considered defendant's other contentions, but they do not call for comment. Assuming that his complaint of ineffective assistance of counsel is before us because the alleged deficiencies are adequately apparent on the record, United States v. Caggiano, 899 F.2d 99, 100 (1st Cir. 1990), with which compare United States v. Hoyos-Medina, 878 F.2d 21, 22 (1st Cir. 1989), we do not find them meritorious.

Affirmed.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX 2. INTERSTATE AGREEMENT ON DETAINERS

s 1. Short title

That this Act may be cited as the "Interstate Agreement on Detainers Act".

Pub.L. 91-358, Dec. 9, 1970, 84 Stat. 1397.

Interstate Agreement on Detainers, s 1 , 18 U. S. C. A. App. 2 18 USCA APP. 2 s 1

s 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability isinitiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: And provided further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand: "(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given. "(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made. "

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State. "

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"Article VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"Article VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"Article VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"Article IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

s 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

Pub.L. 91-358, Dec. 9, 1970, 84 Stat. 1397.

Interstate Agreement on Detainers, s 3 , 18 U. S. C. A. App. 2
18 USCA APP. 2 s 3
END OF DOCUMENT

s 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

Pub.L. 91-358, Dec. 9, 1970, 84 Stat. 1397.

UNITED STATES CODE ANNOTATED
COPR. (c) WEST 1990 No Claim to Orig. Govt. Works
APPENDIX 2. INTERSTATE AGREEMENT ON DETAINERS

s 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

Pub.L. 91-358, Dec. 9, 1970, 84 Stat. 1397.

s 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

UNITED STATES CODE ANNOTATED
COPR. (c) WEST 1990 No Claim to Orig. Govt. Works
APPENDIX 2. INTERSTATE AGREEMENT ON DETAINERS

s 9. Special provisions when United States is a receiving State

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State-- (1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice; and (2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

(Added Pub.L. 100-690, Title VII, s 7059, Nov. 18, 1988, 102 Stat. 4403.)

Interstate Agreement on Detainers, s 9 , 18 U. S. C. A. App. 2
18 USCA APP. 2 s 9
END OF DOCUMENT

No. 91-7050

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KEVIN G. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
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QUESTIONS PRESENTED

1. Whether the Interstate Agreement on Detainers required dismissal of the indictment against petitioner, when petitioner, a state prisoner with a federal detainer lodged against him, chose to return to state custody after being brought to federal court for arraignment.

2. Whether petitioner received effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 947 F.2d 1002.

JURISDICTION

The judgment of the court of appeals was filed on October 28, 1991. A petition for rehearing was denied on November 21, 1991. The petition for certiorari was filed on January 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on three

counts of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to 84 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1-4.

1. On June 8, 1989, petitioner attempted to rob the Cambridge Trust Company, a federally insured financial institution in Cambridge, Massachusetts. When the teller delayed in responding to petitioner's demand for money, petitioner fled without obtaining any money. Later that day, petitioner robbed the First American Bank, a federally insured institution in Boston, and escaped with $2,360. On June 22, 1989, petitioner entered the Boston Five Cents Savings Bank, another federally insured bank, and passed a note to the teller demanding money. Petitioner again fled without obtaining any money when the teller delayed in responding to the note. Gov't C.A. Br. 7-10.

2. Based on a different incident, petitioner was arrested on state bank robbery charges and incarcerated at the state correctional institution at Concord, Massachusetts. On June 29, 1989, a federal arrest warrant was issued charging petitioner with unarmed bank robbery. On July 18, 1989, the United States Marshals Service served a detainer on petitioner at the Concord facility without informing the United States Attorney. Pet. App. 2; Gov't C.A. Br. 1. Petitioner refused to sign the acknowledgement that he had received notice of the detainer. C.A. App. A31. On September 23, 1989, petitioner was sentenced on the state bank robbery charges to a four-to-five-year term of

imprisonment. Gov't C.A. Br. 1.

On October 4, 1989, a federal grand jury indicted petitioner on three counts of unarmed bank robbery. On November 7, 1989, a writ of habeas corpus ad prosequendum was issued to bring petitioner before a federal magistrate for arraignment. At the arraignment, the magistrate asked the Assistant United States Attorney whether any detainer had been filed against him. The prosecutor responded, "There's no detainer pending or anything." The magistrate further asked, "No demand on the interstate detainer act?," and the prosecutor replied, "No, your honor." C.A. App. A36-A37. The United States Attorney's office had no notice or knowledge of the detainer that had been filed by the Marshals Service almost four months before.

The magistrate then advised petitioner that he could remain in federal custody, in which case he would receive no credit on his state sentence, or he could elect to return to state custody to continue serving his state sentence. Petitioner elected to return to state custody. At the same time, the magistrate informed petitioner that a detainer would be filed against him and explained that the filing of the detainer meant that when petitioner was released from state custody, he would be brought back before the magistrate for a bail hearing. C.A. App. A36-A39. In response, petitioner asked the magistrate an unrelated question about the relationship between his two prosecutions. Although petitioner knew of the detainer, he never mentioned that it had been filed against him. Pet. App. 2. After the

arraignment, petitioner was returned to state custody. Ibid.

While petitioner was serving his state sentence, he was brought to trial on the federal indictment. On the first day of trial, petitioner moved to dismiss the indictment, asserting that the events of November 7, 1989, violated the Interstate Agreement on Detainers (IAD). At that point, the prosecutor, petitioner's counsel, and the court learned for the first time that a detainer had been filed against petitioner in July 1989. C.A. App. A59-A63. The district court denied the motion to dismiss. Id. at A65, 69.

3. The court of appeals affirmed. Pet. App. 1-4. The court concluded that it was a technical violation of the IAD for petitioner to have been returned to state custody after a detainer had been filed and he had been brought to federal court on a writ of habeas corpus ad prosequendum. Relying on circuit precedent, however, the court held that the brief interruption in state custody did not threaten petitioner's rehabilitation, especially since petitioner had been promptly returned to the same state institution. Thus, the underlying purposes of the IAD were not implicated, and there was no reason to dismiss the indictment. Id. at 3. The court also rejected petitioner's claim that he received ineffective assistance of counsel. Id. at 4.

ARGUMENT

1. Petitioner renews his contention (Pet. 9-18) that the IAD was violated on November 7, 1989, when he was returned to

state custody without being tried in federal court, and that he is therefore entitled to dismissal of the indictment. That contention is without merit.

Article IV of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, Article IV, sets forth a procedure by which a State (including the federal government, see United States v. Mauro, 436 U.S. 340, 353-356 (1978)) that has lodged a detainer against a person who is incarcerated in another State can secure the prisoner's presence for disposition of outstanding charges. Once a detainer is filed with the "sending State," a prosecutor can have the prisoner made available by presenting to the officials of the sending State "a written request for temporary custody or availability." Article IV(a). A writ of habeas corpus ad prosequendum constitutes such a request. United States v. Mauro, 436 U.S. at 361-365. When a State has secured the presence of a prisoner through this process, the receiving State must try the prisoner on the charges supporting the request before returning the prisoner to the sending State. Article IV(e). If a trial is not held, the IAD provides that the indictment will be dismissed with prejudice. Ibid.

Although petitioner is correct that the federal government did not try petitioner before returning him to state custody on November 7, 1989, he is not entitled to have the federal indictment against him dismissed. First, at his November 7, 1989, arraignment, petitioner was given a choice between remaining in federal custody and being tried before being

returned to state custody, and returning to state prison to complete his sentence before being tried on the federal charges. Petitioner chose to return immediately to state custody. In light of that free choice, petitioner cannot now invoke the protections of the IAD.[1] It is well established that "since [the] purpose [of Article IV(e)] is to benefit the prisoner, the prisoner may waive its protection." United States v. Oldaker, 823 F.2d 778, 780 (4th Cir. 1987); see also United States v. Boggs, 612 F.2d 991, 993 (5th Cir.), cert. denied, 449 U.S. 857 (1980); Gray v. Benson, 608 F.2d 825, 827 (10th Cir. 1979); United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), aff'd on other grounds sub nom. United States v. Mauro, 436 U.S. 340 (1978); United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977), cert. denied, 436 U.S. 943 (1978).

In addition, petitioner's brief absence from state custody implicated none of the purposes of the IAD and does not justify dismissal of the indictment. Article IV(e) of the IAD -- the so-called "anti-shuttling" provision -- is intended to avoid the disruptive effect that repetitive transfers between jurisdictions might have on the rehabilitation of prisoners and to prevent prisoners from being penalized by the pendency of unresolved detainers. See United States v. Currier, 836 F.2d 11, 15 (1st Cir. 1987); United States v. Roy, 830 F.2d 628, 636 (7th Cir. 1987), cert. denied, 484 U.S. 1068 (1988). In this case,

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[1] We note that petitioner was the only participant in the federal arraignment proceeding who knew that a federal detainer had been lodged against him.

petitioner was brought to federal court for arraignment and returned to state custody in the same state prison on the same day. That absence could hardly have interfered with petitioner's rehabilitation or caused state officials to penalize him. Indeed, although petitioner asserts (Pet. 13) that he "may have" suffered adverse consequences because of his absence from state custody, he makes no specific claim of prejudice. Under similar circumstances, a number of courts have declined to require dismissal of an indictment. See, e.g., United States v. Roy, 830 F.2d at 636-637; United States v. Roy, 771 F.2d 54, 59-60 (2d Cir. 1985), cert. denied, 475 U.S. 1110 (1986); Sassoon v. Stynchombe, 654 F.2d 371, 374-375 (5th Cir. 1981); Huff v. United States, 599 F.2d 860, 863 (8th Cir.), cert. denied, 444 U.S. 952 (1979); United States v. Chico, 558 F.2d 1047, 1049 (2d Cir. 1977), cert. denied, 436 U.S. 947 (1978).

Petitioner claims (Pet. 14-16) that the decision here conflicts with the decisions in United States v. Thompson, 562 F.2d 232 (3d Cir. 1977) (en banc), cert. denied, 436 U.S. 949 (1978), and United States v. Schrum, 638 F.2d 214 (10th Cir. 1981), aff'g 504 F. Supp. 23 (D. Kan. 1980). Petitioner is correct that in those cases the Third and Tenth Circuits held that even technical violations of the IAD require dismissal of the indictment. Even if that issue -- which arises infrequently and affects few cases -- might otherwise merit this Court's view, this case does not present an appropriate vehicle for its resolution. As we have argued, petitioner elected to be returned

to state custody after his federal arraignment; he therefore waived the protections of the IAD. Moreover, with respect to cases like the present one, in which the receiving State is the federal government, Congress has provided that the sanction of mandatory dismissal with prejudice for violations of Article IV(e) is inappropriate. In Section 9(1) of the IAD, Congress provided that in such cases

> any order of a court dismissing any indictment * * * may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider * * * the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice * * *.

If petitioner were to prevail, it would be inappropriate for any court to dismiss the indictment with prejudice in light of the de minimis violation of the IAD that occurred here and the lack of prejudice to petitioner.

2. Petitioner also contends (Pet. 18-20) that he received ineffective assistance of counsel because his trial counsel failed to discover that petitioner had a meritorious claim under the IAD. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was objectively unreasonable and that counsel's errors prejudiced the defendant. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner cannot meet either prong of that test.

First, petitioner's counsel did not raise petitioner's claim under the IAD because he was unaware that a detainer had been

lodged against petitioner in July 1989. In light of the fact that neither the United States Attorney nor the court knew of the detainer, petitioner's counsel cannot be faulted for failing to discover its existence. Counsel's failure to raise the IAD issue prior to trial was therefore not unreasonable.[2]

Second, petitioner cannot establish that he was prejudiced by counsel's failure to raise his claim under the IAD. Petitioner himself raised that claim prior to trial, and the court considered the claim on the merits and rejected it. The court of appeals affirmed the district court's decision. We fail to see what difference it could have made that petitioner raised the claim rather than counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

MAY 1992

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[2] Petitioner argues (Pet. 19-20) that his counsel's failure to press the IAD claim once he became aware of it also constituted ineffective assistance. To the contrary, counsel's tactical decision not to press an argument that was foreclosed by squarely applicable, indistinguishable circuit precedent, see United States v. Taylor, 861 F.2d 316 (1st Cir. 1988), does not constitute ineffective assistance.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KEVIN G. TAYLOR, PETITIONER

V

UNITED STATES OF AMERICA

NO. 91-7050

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on May 13, 1992.

DANIEL K. SHERWOOD
380 PLEASANT STREET
SUITE 25
MALDEN, MA 02148

Kenneth W. Starr
KENNETH W. STARR
Solicitor General

May 13, 1992

No. 91-7050

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KEVIN G. TAYLOR,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

PETITIONER'S REPLY TO GOVERNMENT'S OPPOSITION TO WRIT OF CERTIORARI

The Petitioner Kevin G. Taylor respectfully submits this Reply to the Government's Opposition to Writ of Certiorari.

The government's opposition to the petition regarding the Interstate Agreement on Detainers ("IAD") has two prongs. The first is that the Petitioner waived his IAD rights at the arraignment and the second is that he has not claimed any prejudice because of the acknowledged IAD violation.

WAIVER

The government misstates the record when it asserts that the Petitioner exercised a free choice to waive his IAD rights at the Arraignment. (A copy of the transcript of the Arraignment is part of the record and is found in pages 32-42 of the Court of Appeals Appendix.) At the Arraignment, Magistrate Cohen informed the Petitioner that he had the right to remain silent. The Magistrate then had a discussion with the prosecutor about detainers. The Magistrate then informed the Petitioner that he could be held federally and lose time on his state sentence or go back to the state institution. (This statement by the Magistrate is incorrect. Under the terms of the IAD, the Petitioner's state sentence would not have been interrupted if he had been detained federally. See Article V(f) of the IAD.) The Petitioner merely replied that he just did not want his state sentence interrupted.

At no time did the Petitioner waive any right at the Arraignment. The Petitioner merely stated that he did not want his state sentence interrupted and he otherwise exercised his right to remain silent. The Petitioner was unrepresented by counsel at the Arraignment. The government's Opposition by implication argues that not only does the Petitioner not have the right to remain silent, but he also has the affirmative duty to speak even before he has had the opportunity to confer with defense counsel. The government asserts that the Petitioner has the affirmative duty to inform the government what it is doing. He has the duty to inform

the U.S. Attorney what the U.S. Marshall is doing. Clearly, the Petitioner has no such duty. If the government does not know what it is doing, then it must suffer the consequences of its errors.

The Petitioner has addressed the issue of Waiver in his Brief to the Court of Appeals at pages 14 - 23. The First Circuit considered the government's contention that the Petitioner had an obligation to speak and dismissed the contention in footnote 1 of that Court's decision.

NO SHOWING OF PREJUDICE

Neither Article III nor IV of the IAD requires a defendant to assert, as a pre-condition, that he has been prejudiced by the placing of a detainer against him in order to secure the benefits of the IAD. Those Articles are procedural in nature. A defendant seeking to have untried indictments heard must comply with Article III and the government must comply with Article IV when it seeks temporary custody of a prisoner. Specifically for this case, Article IV does not impose on the defendant an obligation to show a harm before he is entitled to the protections of Article IV.

The government and the First Circuit have assumed that the Petitioner suffered no injury because of the detainer and, therefore, no IAD violation has occurred. It is the assumption that the Petitioner has suffered no harm because of the detainer that is contrary to the IAD. The government makes the Petitioner's

case when it argues that § 9(2) requires the District Court to consider a number of factors before actually dismissing an indictment with prejudice. Section 9(2) is designed, inter alia, to place on the record what injury, if any, that a defendant has suffered because of a detainer. Pursuant to §9(2), a defendant would have the opportunity to have counsel prepare for a hearing where testimony and documents along with argument could be presented to the District Court and specific findings made about whether dismissal with or without prejudice is appropriate. Nothing of this nature was done in this case.

Section 9(2) also makes clear that a defendant does not have to assert a harm to receive the benefits of the IAD. The issue of harm only arises after it has been determined that there has been a violation of the IAD and the District Court is deciding whether to dismiss the indictment with or without prejudice.

Lastly, while §9(2) permits an indictment to be dismissed with or without prejudice, the indictment is still dismissed. The government may or may not have the opportunity to bring a new indictment against the Petitioner, but the present indictment is nonetheless dismissed.

Dated: May 18, 1992

Respectfully submitted
Kevin G. Taylor
By His Attorney

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May 18, 1992

Office of the Clerk
United States Supreme Court
Washington, D.C. 20543

Re: Kevin G. Taylor, Petitioner
Vs: United States of America, Respondent
No: 91-7050

Dear Sir/Madam:

Please find enclosed for filing the following:

1.) Petitioner's Reply to Government's Opposition to Writ of Certiorari; and
2.) Certificate of Service.

Kindly place the enclosed matter on the Court's docket.

Thank you.

Very truly yours,

Daniel K. Sherwood

enc.
cc: Kevin Taylor
Kenneth W. Starr, Esq.

CERTIFICATE OF SERVICE

KEVIN TAYLOR, Petitioner v. UNITED STATES, Respondent

U.S. SUPREME COURT NO: 90-7050

The undersigned hereby certifies that he has this day mailed, by first class mail, postage prepaid, a copy of the within pleading to:

Kenneth W. Starr, Esquire
Solicitor General
U.S. Dept. of Justice
Washington, D.C. 20530

Kevin Taylor
78258-012
3901 Klein Blvd. (SUP)
Lompoc, CA 93436

Signed under the penalties of perjury this 18th day of May, 1992.

Daniel K. Sherwood
380 Pleasant Street, Suite 25
Malden, Massachusetts 02148
(617) 324-4840

SUPREME COURT OF THE UNITED STATES

KEVIN TAYLOR *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 91–7050. Decided June 15, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The Court of Appeals held that the Interstate Agreement on Detainers (IAD), 18 U. S. C. Appendix 2, Art. IV(e), did not compel dismissal of the indictment against petitioner, who was taken from state custody in Massachusetts to Federal District Court on a writ of habeas corpus *ad prosequendum* for arraignment on an unrelated crime and returned to state custody the same day. The Courts of Appeals are divided as to the propriety of dismissal when technical violations of the IAD occur. Some courts take CA1's view that such violations do not merit dismissal, see, *e.g.*, *United States* v. *Roy*, 830 F. 2d 628, 636 (CA7 1987), cert. denied, 484 U. S. 1068 (1986); *United States* v. *Roy*, 771 F. 2d 54, 60 (CA2 1985), cert. denied, 475 U. S. 1110 (1986); *Sassoon* v. *Stynchombe*, 654 F. 2d 371, 374–375 (CA5 Unit B Aug. 1981); but others do not, see, *e.g.*, *United States* v. *Thompson*, 562 F. 2d 232, 234 (CA3 1977) (en banc), cert. denied, 436 U. S. 949 (1978); *United States* v. *Schrum*, 638 F. 2d 214 (CA10 1981), aff'g 504 F. Supp. 23 (D Kan. 1980). CA9 has expressly recognized this conflict, and sided with the position taken by CA1, CA2, CA5, and CA7. See, *e.g.*, *United States* v. *Johnson*, 953 F. 2d 1167, 1171 (1992).

One of the Court's duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country. The Court is surely not doing its best when it denies certiorari in this case, which

presents an issue on which the Courts of Appeals are recurringly at odds. I would grant certiorari.